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Supreme Court of the United States

October Term, 1962

No. 1044

HAROLD WAPNICK,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT S. SIEGAL,
Attorney for Petitioner.

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Supreme Court of the United States

October Term, 1962

No.

HAROLD WAPNICK,

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against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the Court of Appeals for the Second Circuit which affirmed the conviction of petitioner and others of violation of 18 U. S. C., Sec. 2312, and conspiracy to violate that Sec., 18 U. S. C., Sec. 371 for which petitioner was sentenced to two three year sentences to run consecutively.

The Opinion Below

The Court of Appeals opinion is not reported but is annexed hereto as an appendix.

The Grounds of Jurisdiction

(i) The judgment sought to be reviewed was dated and entered on March 27, 1963.

(ii) Jurisdiction of this Court is invoked under 28 U. S. C. S. 1254(1).

Questions Presented for Review

1. May a defendant who has been acquitted in the State Court be tried in the Federal Court for a crime involving the same issues of fact.

2. May a defendant who has been acquitted by a Jury of participation in a conspiracy be tried again on the same issue as to whether or not he was a party to the same conspiracy.

3. How many times must a defendant face a Jury on the same issue of whether or not he was a member of a conspiracy.

4. Does not a determination by one Jury of an issue or a fact determine forever that issue or fact.

5. May a defendant be convicted of the crime of conspiracy to violate the Federal Laws on proof only of a conspiracy to violate the laws of the State of New York.

6. May a defendant be convicted of the crime of conspiracy to violate the Federal Laws where there is no proof of an agreement to violate the Federal Laws or no proof of facts from which an inference could be taken of a conspiracy to violate the Federal Laws.

7. May a defendant be convicted of the crime of transporting or causing to be transported in interstate commerce, motor vehicles knowing the same to have been stolen, without proof that the defendant transported or caused to be transported or aided and abetted the same, in interstate commerce.

8. May a defendant be convicted of the crime of transporting or causing the transportation in interstate commerce of motor vehicles, when the same were sold in the State of New York to reputable dealers in the State of New York who did not know at time of their purchases to

whom they would in turn resell or where the motor vehicles would eventully go to.

9. Did the Court err in instructing the Jury that with respect to the substantive counts of transportation that it was not necessary for the Jury to find that the defendants had actual knowledge of interstate transportation.

Constitutional Provisions

Constitution of the United States: Fifth Amendment "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb* * *".

Statutes Involved

Title 18, U. S. C., Sec. 371:

> "If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each should be fined not more than $10,000.00, or imprisoned not more than five years, or both".

Title 18, U. S. C., Sec. 2312:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

Title 18, U. S. C., Sec. 2:

> "Principals:
>
> A. Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

B. Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such".

Statement of the Case

The defendant Wapnick, a Certified Public Accountant of New York, age 35, married and never before convicted of a crime, was engaged in the business of financing hundreds of Auto Repair Shops throughout New York City. That he advanced monies for repairs and parts, and on certain occasions supplied parts himself. Every dollar he advanced and every dollar he received was by check and deposited in his own account.

The alleged conspiracy contained in the indictment before the Federal Court allegedly stems from an alleged agreement between Harold Wapnick, Phillippe Roy, and Jose Monteiro to commit the crimes alleged in the Federal Indictment and the Bronx Indictment and that the so-called conspiracy referred to in the Federal Indictment is the same alleged common plan or scheme that was tried before the County Court of Bronx County.

The principal witness against Wapnick was one Roy who testified that Wapnick was his partner in a conspiracy to buy wrecks, and steal cars and substitute the numbers from the wrecks on to the stolen cars.

The testimony showed that Wapnick advanced thousands of dollars to Roy for purchase of wrecks, parts and repairs and that he received the same rate of commission approximately $100, per car, as he was getting when advancing similar sums of monies for repairs in legitimate cars.

The testimony showed that Roy received about 90% of the monies in the deal.

The testimony showed that Wapnick advanced these sums of monies for purchases of wrecks which Wapnick

undertook was to be repaired and then sold. The testimony showed that Wapnick paid for parts to be put on cars and for repairs which Roy charged for but never made.

It would be against logic that a person would advance thousands of dollars in an illegal venture to earn the same rate of commission that he earned for years in the same business in a legal venture.

The documentary proof introduced by the petitioner such as books of account, checks and assignments were not disputed.

It is further noted at this time that Roy testified that Wapnick had knowledge that these cars were stolen and were not to be repaired, yet we find that at Roy's request Wapnick paid by check $250 to purchase a front to be placed on a wreck bought with Wapnick's money.

Wapnick, at request of Steinbrecher executed a written guarantee as to all cars theretofore and thereafter sold.

This is clearly another instance which clearly shows that Wapnick had no knowledge that the wrecks were not being repaired.

The issue was simply whether or not Wapnick had knowledge that Roy was stealing cars and substituting them for the wrecks and therefore a participant in the illegal conspiracy.

All of this testimony was submitted to the jury in the Bronx Supreme Court, and the petitioner was acquitted. Thereafter the same testimony in substance was submitted to the jury in the Federal Court, and the jury convicted.

Reasons for Granting the Writ

1. It is petitioner's contention before this Honorable Court that petitioner's constitutional guarantee against Double Jeopardy was violated in that the offense charged

in the indictment was in fact, even though not in name, the same for which the appellant was previously acquitted in *People* v. *Wapnick, et al.*, in the Bronx County Court; and that certainly collateral estoppel operates to preclude the submission of an issue which has already been determined in a Court of competent jurisdiction, in this case, the issue being Wapnick's connection with this conspiracy.

The factual issue before the Bronx County Court, and the factual issue presented before the Federal Court are one and the same, namely; whether or not Wapnick had any knowledge that any of the cars in question were stolen cars; and the Bronx County Court Jury by its verdict replied in the negative.

It is respectfully contended by the petitioner that a finding that there was no participation in a conspiracy is binding in a later prosecution for aiding and abetting in the commission of the substantive crime which was the sole object of the conspiracy; *Sealfon* v. *U. S. A.*, 332 U. S. 575; *Cosgrove* v. *U. S. A.*, 224 F. 2d 146.

In *People v. Grzeszczak*, 77 Misc. 202, 206 and 208, the Court had before it the question whether the People were collaterally estopped from relitigating an issue of identity following an acquittal of a different crime. Double Jeopardy was held not available as a defense but the Court held that collateral estoppel was available and the defendant's former acquittal was a bar to the maintenance of the second prosecution.

In summary, collateral estoppel may be a bar to the bringing of the second prosecution or merely an estoppel to the relitigation of particular facts or mixed issues of fact and law previously determined. *Sealfon* v. *U. S.*, 332 U. S. 575.

"This was second attempt to prove the agreement which at each trial was crucial to the prosecution's case and

which was necessarily adjudicated in the former trial to be nonexistent.

"The Court held that the core of the prosecutor's case was based upon the corrupt agreement which was necessary adjudicated in the former trial to be non-existent".

Res judicata applies to criminal as well as civil proceedings and operates to conclude those matters in issue which the verdict determined, though the offenses be different. *U. S.* v. *Oppenheimer*, 252 U. S. 85.

"The core in each case was the same".

How many times may a defendant be put on trial and face the same witnesses on the same issue.

Here the petitioner was twice put on trial before a Jury and first was acquitted in the State Court, and then convicted in the Federal Court on the same issue.

Is there no end.* May he be tried again and again.—

2. It is the contention of the petitioner herein that there was absolutely no evidence in the record from which a finding could be made that there existed a conspiracy to violate the laws of the United States.

There was no testimony by any witness to such effect.

The gist of the crime is the convention or combination of minds. "A conspiracy is constituted by an agreement; it is however, the result of the agreement, and not the agreement itself. The formal agreement between the parties is essential to the formation of the conspiracy, for the agreement may be shown if there be concert of action, all the parties working together understandingly, with a single

* Subsequent to the conviction in the Federal Court the petitioner was again placed on trial in the Queens County Court on the same issues and facing the same witnesses, and this time he was acquitted. Thus making the score two acquittals to one conviction.

design for the accomplishment of a common purpose." *Fowler* v. *U. S.*, 273 F. 15.

A conspiracy to cause stolen cars to be transported in interstate commerce does not exist unless it is understood to be a part of the project that the cars shall cross state lines.

It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding. *U. S.* v. *Crimmins*, 123 F. 2d 271; *Gable* v. *U. S.*, 84 F. 2d 929; *Linde* v. *U. S.*, 13 F. 2d 59; *Davidson* v. *U. S.*, 61 F. 2d 250.

In the case at bar, the cars mentioned in Counts Six thru Sixteen were sold to one Steinbrecher, a reputable wholesale second hand dealer of automobiles with a place of business on Jerome Avenue in the Bronx, and were immediately on purchase by him, put on his lot for resale to any other wholesaler who came upon the lot and wanted to purchase said cars. At the time Steinbrecher purchased the cars, he did not know who the purchaser would be or where the cars would ultimately go to, and the cars were resold by him in New York.

It is respectfully submitted that these cars came to rest in New York, and were not a part of an interstate transportation.

In Counts Three, Four and Five, the cars were sold to Mindy Motors, a Bronx second hand dealer in automobiles who in turn sold the cars to whatever customers they had and then transported by them to their customer.

It is contended respectfully that title to these cars passed in New York, whether paid for in cash or on credit.

It is respectfully submitted that these cars came to rest in New York, and were not a part of an interstate transportation.

In Counts One and Two, there is no testimony in the record that appellant told anyone to take the cars involved to Connecticut. It was not until after cars had been brought to Connecticut that appellant heard that they were in Connecticut. These cars are also part of Mindy Motors transactions as DiNapoli testified he considered LaFazia and Brill working for LaFazia, as representing Mindy Motors. The testimony is that these two counts, One and Two, refer to the last transactions in this case.

None of the witnesses who were produced by the Government to establish the conspiracy, namely, Phillippe Roy and Jose Monteiro, testified that it was a part of the plan and scheme to transport cars across state lines.

If the Government now contends that they want to enlarge the scope of the conspiracy by asking that the conspiracy be inferred from the acts of the conspirators, then it is respectfully submitted that the fact that three cars out of seventeen are taken across state lines is not a basis for such an inference that the scheme or plan or conspiracy was to transport stolen cars across state lines when fourteen of the cars involved were sold in the State of New York, and the cars involved in Counts One and Two that went to Connecticut were sold in New York and negotiated and resold over telephone in New York to a buyer in Connecticut.

Knowledge that the cars were being moved in interstate commerce is a necessary element of conspiracy count.

A conspiracy to cause automobiles to be transported in interstate commerce does not exist unless it is understood to be part of the project that the cars shall cross state lines. *United States* v. *Crimmins*, 123 F. 2d 271.

3. It is the contention of the petitioner herein that the record is bare of any testimony that the petitioner transported or caused to be transported in interstate commerce

motor vehicles knowing the same to have been stolen as alleged in Counts One thru Sixteen.

That Title 18, U. S. C., Sec. 2312 relates to the transportation of motor vehicles in interstate commerce knowing the same to have been stolen, is a criminal statute and as such all of the elements thereof must be proved to the satisfaction of a jury beyond a reasonable doubt.

In order to sustain a conviction under Title 18, U. S. C., Sec. 2312, the Government must prove that the defendant transported or caused to be transported a motor vehicle in interstate commerce and that defendant knew the motor vehicle to have been stolen at the time he transported or caused the transportation. *Evans* v. *U. S.*, 240 Fed. (2) 695.

That in a prosecution under Title 18, U. S. C., Sec. 2312, the burden of proof is upon the Government to prove that at the time defendant received the automobile he had knowledge that it was stolen and in addition, that he (the defendant) either moved or caused the same to be moved in interstate commerce, or, across state lines. *Seefeldt* v. *U. S.*, 183 Fed. (2) 713.

That in order to secure a conviction under Title 18, U. S. C., Sec. 2312, the prosecution must establish beyond a reasonable doubt that defendant

A. transported or caused to be transported a motor vehicle in interstate commerce;

B. that said motor vehicle was, in fact, a stolen car, and

C. that defendant knew said motor vehicle to have been stolen at the time of said transportation. *United States* v. *Leggett*, 269 F. 2d 35, 1959, 7th Cir.; *Spalitto* v. *United States*, 39 F. 2d 782.

4. It is the contention of the petitioner that the Court below erred in instructing the jury that under the substan-

tive crimes of transporting it was not necessary to prove knowledge, and that foreseeability was sufficient, whereas under the conspiracy count, it was necessary to prove knowledge, which is more than foreseeability.

I respectfully submit, therefore, that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the conviction of petitioner.

Respectfully submitted,

HERBERT S. SIEGAL,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 242—October Term, 1962

(Argued March 5, 1963 Decided March 27, 1963)

DOCKET NO. 27537

UNITED STATES OF AMERICA,

Appellee,

v.

HAROLD WAPNICK, JAMES LAFAZIA, CHARLES GERSH, and DAVID BRILL,

Defendants-Appellants.

Before:

CLARK and WATERMAN, *Circuit Judges,* and ANDERSON, *District Judge.*

Appeal from the United States District Court for the Eastern District of New York, John R. Bartels, Judge.

Harold Wapnick, James LaFazia, Charles Gersh, and David Brill appeal from judgments of conviction, upon a jury verdict, on an indictment charging transportation in interstate commerce of stolen motor vehicles, in violation of 18 U. S. C. § 2312, and conspiracy to violate that section, 18 U. S. C. § 371. Affirmed.

HERBERT S. SIEGAL, Bronx, N. Y., *for defendant-appellant Harold Wapnick.*

JOSEPH BRILL, New York City, *for defendant-appellant James LaFazia.*

JACOB W. FRIEDMAN, New York City, *for defendants-appellants Charles Gersh and David Brill.*

JEROME C. DITORE, Asst. U. S. Atty., E. D. N. Y., Brooklyn, N. Y. (Joseph P. Hoey, U. S. Atty., Brooklyn, N. Y., on the brief), *for appellee.*

PER CURIAM:

The evidence here was quite sufficient and the case was fairly tried and properly presented to the jury. Hence we find no reversible error. Defendant Wapnick's contention of double jeopardy is *prima facie* untenable in the light of *United States* v. *Lanza*, 260 U. S. 377, and *Abbate* v. *United States*, 359 U. S. 187.

Affirmed.

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No. 1074

IN THE

Supreme Court of the United States

October Term, 1962

JAMES LaFAZIA, CHARLES GERSH and DAVID BRILL,

Petitioners,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH BRILL and JACOB W. FRIEDMAN,
Attorneys for Petitioners.

LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

JAMES LAFAZIA, CHARLES GERSH and DAVID BRILL,
Petitioners,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now come James LaFazia, Charles Gersh and David Brill, by their attorneys, Joseph Brill and Jacob W. Friedman, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Eastern District of New York, which Court imposed a prison sentence on each of the petitioners.

A codefendant, one Harold Wapnick, tried simultaneously with these petitioners, is filing an independent petition for a writ of certiorari, and the present petition is based upon the record which he has caused to be certified.

Opinion Below

The Court of Appeals rendered the following memorandum opinion:

> "PER CURIAM:
>
> "The evidence here was quite sufficient and the case was fairly tried and properly presented to the jury. Hence we find no reversible error. Defendant Wapnick's contention of double jeopardy is *prima facie* untenable in the light of *United States* v. *Lanza*, 260 U. S. 377, and *Abbate* v. *United States*, 359 U. S. 187.
>
> "Affirmed."

Jurisdiction

The judgment of the Court of Appeals was entered on March 27, 1963. On April 26, 1963, Mr. Justice Harlan signed an order extending petitioners' time to file for certiorari to and including May 6, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254; 18 U. S. C. 2(a); 21 U. S. C. 173, 174; 18 U. S. C. 371; 26 U. S. C. 2553(a); 26 U. S. C. 2554(a); and Rule 17c of the Federal Rules of Criminal Procedure.

Statutes Involved

Petitioners were convicted of transporting stolen motor vehicles in interstate commerce, and of conspiracy, in violation of 18 U. S. C. 2312, 371, 2.

Statement of Proceedings

Trial was had before Bartels, D. J., and a jury, and consumed eight weeks, terminating December 7, 1961. The record consists of more than 3,500 pages and many exhibits. Besides petitioners and Wapnick, ten other defendants were named in the lengthy indictment. The case against one was dismissed; two obtained severances; and seven pleaded guilty before trial.

Petitioners were convicted on various counts and sentenced as follows: LaFazia nine months; Gersh three and one-half years; and Brill six months. They were continued on bail during the pendency of appellate proceedings.

Questions Presented

The several questions raised are indicated in the captions of the argument's subdivisions below.

Reasons for Granting Writ

The argument has consistently been made by petitioners below, and they reiterate it in this Court, that they are innocent, having had no knowing connection with or participation in the offenses charged. They recognize that this is not the forum for the presentation of questions of fact. However, they contend that the facts necessary to sustain a conviction are absent, so much so as to render improper the submission to the jury of the issues as to them. In any event their innocence is certainly not a factor which should detract from the validity of the arguments they advance in any appellate tribunal.

Quite apart from the foregoing, the case involves a number of questions upon which the determination reached is in apparent conflict with established law. The rulings of the trial Court, heretofore sustained herein, constitute prejudicial and reversible error. In at least one instance, the ruling of the Court of Appeals is at variance with the holdings of other Federal Courts of Appeals on the same subject. This diversity of opinion in different circuits relates to important questions of Federal law which should be settled by this Court.

In view of the requirements of the rules that the questions presented for review be expressed without unnecessary detail, an attempt will be made to set forth these matters as concisely as is consistent with the necessities of the case.

ARGUMENT

QUESTION No. 1

Whether the record presents any evidence that these petitioners were guilty of the crimes charged and whether the trial Court erred in denying their respective motions to dismiss. In this connection, whether the Second Circuit rule as to the sufficiency of the evidence to send a case to the jury in a criminal prosecution is the same as in a civil action, and whether this is a proper rule although admittedly in conflict with the law as announced in other Federal Circuits.

Each of the petitioners contended below that the Government had failed to sustain the burden of proving either the substantive crimes or conspiracy; that the evidence established their honesty and good faith; and that the case with respect to them should not have been sub-

mitted to the jury. Particularly in a case in which so many defendants were named, and in a two-month trial, it was obviously a matter of some difficulty to keep the identities of individuals in mind and to differentiate among them. The course of least resistance would be the assumption that if a person had been mentioned often enough, he must have been party to a crime or crimes. The constant confusion is manifest even in the record, with both trial Court and counsel repeatedly being unable to correlate the evidence.

In *United States* v. *Falcone* (C. C. A. 2, 1940), 109 F. 2d 578, the convictions of five of eight defendants in a conspiracy case were reversed, Learned Hand, Cir. J., writing:

> "It is not enough that he does not forgo a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

This Court unanimously upheld this reversal (311 U. S. 205), Mr. Justice Stone pointing out that knowledge of the conspiracy could not be inferred "from the casual and explained meetings of respondents with others who were convicted as conspirators."

It has consistently been the position of the Government in the Second Circuit that the standard of evidence requisite to send a case to the jury is the same in both civil and criminal cases, in view of the Second Circuit holdings in *United States* v. *Masiello*, 235 F. 2d 279, and *United States* v. *Castro*, 228 F. 2d 807. In the latter case, however, the late Circuit Judge Frank stated that different views were apparently entertained in other circuits, including the Third, Fifth, Eighth, Ninth, Tenth and the District of Columbia. E.g., see *Vick* v. *United States* 216 F. 2d 228. Thus it may fairly be said that in a majority of the circuits a view of the law contrary to that of the Second Circuit is taken. Such a divergence presents a classic case for the exercise of the jurisdiction of the Supreme Court of the United States. The vast number of criminal prosecutions, as attested by the volume of reported cases, as well as official records, eminently requires that the liberty of an individual should not be dependent upon the circuit wherein he is tried. The confused state of the law on the subject calls for authoritative resolution.

QUESTION NO. 2

Whether in reading to the jury the substantive counts of the indictment the trial Court erred in omitting the names of the defendants not on trial.

The trial Court buttressed its instructions by reading to the jury the substantive counts of the indictment (Dec. 6, pp. A-10-21). In so doing, however, the Court omitted the names of ten additional defendants who were not on trial, to which omission exception was duly taken (id., pp. 184-185). To be sure, the whole practice of reading an indictment to the jury is one which the courts "do not

in general commend * * * nor consider it as contributing much to the clarification of factual issues to be decided." *Norman* v. *United States* (C. C. A. 6, 1939), 100 F. 2d 905. Surely, when a trial judge does elect to read the indictment to the jury, the several defendants actually being tried are entitled to have the instructions include the rather fundamental information that ten other persons have been designated defendants in the same indictment by the same grand jury, and that the Government's theory embraces a total of sixteen individuals as alleged participants in the crimes charged. A patent result of neglecting to include the names of the others was to give the trial jury a distorted picture of the various accusations, with the likely effect of magnifying any possible complicity of the defendants actually on trial.

QUESTION NO. 3

Whether the trial Court erred in instructing that the Government did not have to prove defendants' knowledge that stolen cars were being transported in interstate commerce.

Regarding the substantive counts the trial Court charged that knowledge of transportation in interstate commerce was not required, to which exception was taken (Dec. 6, pp. A-36-A-189). Although in a mere conspiracy case knowledge of the interstate character of the transaction is deemed requisite—see *United States* v. *Crimmins* (C. C. A. 2, 1941), 123 F. 2d 271, and *United States* v. *Sherman* (C. C. A. 2, 1948), 171 F. 2d 619—, we submit that the same rule must be held applicable to the substantive offense. The driving must be "done as a substantial step in furtherance of the intended interstate journey." See *Barfield* v. *United States* (C. A. 5, 1956), 229 F. 2d 936.

The case must not be confused with one involving receiving (18 U. S. C. 2313), wherein knowledge of the interstate character of the transportation has been held immaterial (cases cited in 56 A. L. R. 2d 1330).

QUESTION NO. 4

Whether the reception of testimony as to the valuable contents of an automobile alleged to have been stolen did not constitute inadmissible and prejudicial evidence of the commission of another crime.

The Government was permitted to prove, over objection, the valuable contents of a vehicle claimed to have been stolen (Oct. 16, pp. A-3-8). Accordingly there was placed before the jury an imputation of the theft of other property having no bearing upon the crimes charged in the indictment. This evidence was not so closely connected as to constitute it one of the recognized exceptions to the rule forbidding proof of other crimes, and its reception was such as to cause a conviction on charges other than those for which petitioners were on trial. See *Shea* v. *United States* (C. C. A. 6, 1916), 236 F. 97, and *Boyer* v. *United States* (C. A., D. of C., 1942), 132 F. 2d 12.

QUESTION NO. 5

Whether the trial Court erred in receiving hearsay evidence as to the alleged payment of money to one of the petitioners.

Concerning petitioner Gersh, the trial Court permitted hearsay testimony as to the alleged payment of money to him (Oct. 25, p. 481). His counsel promptly requested an

instruction to the jury that this proof was not binding on Gersh, but he was overruled (id., pp. 481-484). Belief by the jury that he was the recipient of $4,600 in this connection may well have influenced a determination of his complicity. The testimony was that of the Government's chief witness (Philippe Roy), and even he was somewhat vague about the matter, saying, "As far as I know, this possibly would happen." The vice of the hearsay was compounded by its character as a mere possibility or conjecture. Proof of such remote kind is not to be received as an element of the requirement that guilt be shown beyond a reasonable doubt. Judicial disapproval of hearsay is of such commonplace occurrence as scarcely to require the citation of authority. See *Hopt* v. *Utah*, (1884), 110 U. S. 574.

QUESTION NO. 6

Whether it was error to receive material testimony as to an alleged telephone conversation with one of the petitioners when the witness neither knew him nor could identify his voice.

One of the prosecution's important witnesses, who did not know petitioner Gersh at all, was allowed, over objection (Nov. 15, pp. 2-4, 120), to testify to a number of supposed telephone conversations with him the effect of which was to suggest consciousness of guilt. The Government pressed to have this proof received, and may not fairly be heard to urge that it was inconsequential or to minimize its importance. Of course, the law is clear that in the absence of proof of the identity of the speaker, testimony as to a telephone conversation with him is not competent, since "the witness must recognize the declar

ant's voice." L. Hand, Circ. J., in *United States* v. *Frankel* (C. C. A. 2, 1933), 65 F. 2d 283. Some identification is necessary. Underhill's Criminal Evidence, 5th ed., Sec. 129; *Lewis* v. *United States* (C. C. A. 6, 1926), 11 F. 2d 745.

QUESTION NO. 7

Whether the trial Court's summary of the evidence in its instructions was not unfair to petitioners.

A substantial portion of the lengthy charge to the jury (Dec. 6, pp. A-2-184) was devoted to a discussion of the evidence. It is not practical to include herein the multifarious details, but the recital was virtually an outline of the Government's case. Counsel for two of the petitioners felt constrained to "take specific exception to resumé of all the facts as they pertained to the defendants Brill and LaFazia" and likewise to the Court's omission to refer to the additional testimony elicited on cross-examination (id., p. A-190). Counsel for a codefendant excepted to the charge because "it appeared not to be a summary as much as your interpretation of the facts" (id. p. A-213).

The law is well established that "an instruction is erroneous which singles out or emphasizes particular testimony or particular parts of the evidence and gives undue prominence thereto." 23A C. J. S. 748. The judge's comment must not "cross the border line of fairness." Simkins' Federal Practice, rev. ed., Sec. 173. See *Leslie* v. *United States*, 43 F. 2d 288. It is imperative where the evidence is reviewed in the charge that it be stated not only accurately, but also "with fairness and impartiality to both sides." Abbott's Criminal Trial

Practice, 4th ed., Sec. 670. Failure to adhere to these principles should vitiate any verdict as having been rendered in violation of the requirement of a fair trial, and especially where, as herein, the case against petitioners was of so slight, flimsy or conjectural character.

QUESTION NO. 8

Whether the purported compliance with the jury's request for redefinition of conspiracy was irresponsive, confusing and prejudicial.

On the second day of deliberations the jury asked for the definition of conspiracy (Dec. 7, p. A-247), requesting explicitly "the short portion" of the charge containing the answer. Nevertheless, the judge insisted upon having read to the jury seven full pages of the charge (id. p. A-249; Dec. 6, pp. A-68-A-74), including divers aspects of the conspiracy concept inimical to defendants, such as the separability of the conspiracy charge, the absence of any requirement that the unlawful object be accomplished, the adequacy of a single overt act, the immateriality of absence of formal agreement, the sufficiency of implied understanding deducible from acts pursuant to apparent criminal purpose, unimportance of fact that a party did not even know the identity of other conspirators, the sufficiency of circumstantial evidence to show guilty knowledge and a reiteration of the supposed rule as to substantive counts that the prosecution did not have to prove actual knowledge of defendants as to interstate transportation. This was concluded with a discussion of "foreseeability" (Dec. 7, p. A-74) which was so obscure as to be quite unintelligible. As a result the instructions were clearly violative of the principles expressed in *Bollenbach v. United States*, 326 U. S. 607, 612.

QUESTION NO. 9

Whether the rights of petitioners were violated by numerous irregularities, especially affecting petitioner Brill.

Various other incidents occurring in the course of the proceedings seriously militated against their fairness. Thus, when the jury requested the rereading of certain testimony, no reporter was present at the time, nor did the Court give the explanation requested by the jury. Secondly, in the midst of the trial the brother of petitioner Brill died, with the result that Brill had to absent himself for three days; the Court refused to halt the proceedings; the trial proceeded in Brill's absence; and damaging testimony was introduced in the interim. Thirdly, Brill's request for a change of lawyers after his return was denied although admittedly counsel representing him could not properly do so by reason of a conflict of interest (the same counsel representing petitioner LaFazia—to whom the ruling was equally unfair). Fourthly, the Court provoked one of the attorneys into a bitter discussion in the presence of the jury, and the effect was necessarily harmful. Fifthly, it developed during the trial that some of the jurors had worked in the court house-building (in the Post Office) for many years, and knew that the postal superintendent, their superior, was a witness in the case; one of these jurors, a postal clerk, occupying seat 5 or 6, later blossomed out as foreman of the jury (although one of the jurors stated in open court that this was without her consent or even her knowledge); and petitioner Brill's protest in this connection was unavailing. Sixthly, a number of motions made by petitioner Brill were never passed on by the trial Court, to wit, to dismiss the indictment or certain counts thereof; and to

declare a search of his premises without a search warrant illegal, although the proof clearly established the merit of his position in this regard. Finally, Government witnesses were permitted to confer with the prosecutor during the course of their testifying, although the Court had ruled that such procedure would not be permitted.

QUESTION NO. 10

Whether the argument of collateral estoppel and double jeopardy, urged by defendant Wapnick, is valid and inures to the benefit of these petitioners.

If the prosecution of Wapnick, by reason of prior proceedings, could not be maintained (as argued by him in his companion petition), it would follow that such a conclusion would have forceful impact upon any attempted trial of petitioners. Any conclusion by the Court in his favor would at the very least necessitate a retrial of petitioners, if not a dismissal of the case as to them.

QUESTION NO. 11

Whether the cumulative effect of the errors urged operated to deprive petitioners of a fair trial.

The best that can be said for the Government's position as to these petitioners is that the proof against them was certainly not of a clear or conclusive character. The least weight ascribable to this feature of the case is that they were entitled to a trial free from prejudicial error, so that incorrect rulings which might otherwise be disregarded must be given greater force in their possible bearing upon the outcome.

The cumulative effect of as few as two errors may necessitate the reversal of a conviction. See *Gordon* v. *United States*, 344 U. S. 414. Especially where the case is "a close one" and not "open and shut," an error otherwise harmless will be viewed as prejudicial. *Bihn* v. *United States*, 328 U. S. 633; *United States* v. *Tomaiolo*, 249 F. 2d 683.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH BRILL and JACOB W. FRIEDMAN,
Attorneys for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1044

HAROLD WAPNICK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1074

JAMES LAFAZIA, CHARLES GLESH, AND DAVID BRILL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. No. 1044, pp. 13–14) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 1963 (R. III, p. 950).[1] A petition for

[1] The record in this Court consists of the appendices to the briefs in the court below. "R. I" refers to the appendix of

rehearing was denied on April 9, 1963 (R. III. 955). The petition for a writ of certiorari in No. 1044 was filed on April 24, 1963. On April 26, 1963, Mr. Justice Harlan extended the time for the filing of a petition for a writ of certiorari by the other petitioners to and including May 6, 1963, and the petition in No. 1074 was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the convictions for transporting motor vehicles in interstate commerce knowing them to have been stolen.

2. Whether the trial court's instructions were proper.

3. Whether the trial court committed other errors invalidating petitioners' conviction.

4. Whether the federal government was precluded from prosecuting petitioner Wapnick for transporting stolen motor vehicles in interstate commerce because he was acquitted in a state court of grand larceny and related crimes concerning different cars.

STATUTE INVOLVED

Section 2312 of Title 18 U.S.C. provides:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not

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the appellants and "R. II" and "R. III" to the first and second volumes of the appellee's appendices. We are lodging herewith a transcript of the trial court's instructions which will be referred to as "A."

more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioners and twelve others[1] were charged in an indictment in the United States District Court for the Eastern District of New York, with transporting (in 16 counts), and conspiring to transport, stolen motor vehicles in interstate commerce in violation of 18 U.S.C. 2312, 371, and 2. After a jury trial, all of the petitioners were convicted on the conspiracy count. In addition, petitioner Wapnick was convicted on all sixteen substantive counts, petitioner Gersh on thirteen counts (counts 1-2, 4-7, 9-10, 12-16), petitioner LaFazia on three counts (counts 3-5) and petitioner Brill on two counts (counts 1-2). Petitioner Wapnick was sentenced to 3 years on each count, the terms on the substantive counts to run concurrently with each other and the term on the conspiracy count to run consecutively thereto. Petitioners Gersh, LaFazia, and Brill were sentenced on each count to 3½ years, 9 months, and 6 months, respectively, the sentences to run concurrently (R. 1, Docket Entries). The court of appeals affirmed *per curiam*.

The government's evidence at the trial included the following pertinent facts:

---

[1] Seven of the defendants who have not petitioned entered pleas of guilty prior to trial. On the motion of the government the case against one other was dismissed and the case against two others severed. Two other defendants went to trial with the four petitioners.

In January 1959, petitioner Wapnick, an automobile parts supplier doing business in New York, approached two automobile repairmen who were his debtors, Roy and Monteiro (both of whom were co-defendants testifying for the government), with a plan whereby the two could pay their debts to him and make money for themselves. Wapnick explained that, instead of repairing automobile wrecks, it would be easier to steal cars matching the description of the wrecks, to transfer the serial number identification plates from the wrecks to the stolen cars, and to sell the stolen cars under the identity of the wrecks (R. II, 358, 364, 366; R. III, 549–550, 594–602). He said that he had professional thieves to do the stealing and the services of lawyers and bondsmen if there was trouble (R. II, 358; R. III, 602). Wapnick was to supply the money to pay the thieves and to buy the wrecks and was to sell the stolen cars after they had been "doctored up" (R. II, 375–376; R. III, 602). The two repairmen agreed to go along with the scheme (R. II, 364; R. III, 602).

In search of wrecks, Roy introduced Wapnick to petitioner Gersh, an owner of an automobile sales lot. Gersh was told by Wapnick that the wrecks were to be used in a stolen car scheme. Gersh agreed to, and did, supply the wrecks for prices as high as $1400 (R. III, 511). Under instructions from Wapnick, Gersh also issued state certificates of sale (known as MV 50's) for the wrecks indicating the sale of the cars by his company. The documents were, at the direction of Wapnick, at first issued to fictitious purchasers and later to Robert Ezersky, a used car

dealer who was a co-defendant (R. II, 400–410, 421; R. III, 552–553).

The wrecks purchased by Wapnick from Gersh and other sources (R. II, 410; R. III, 515, 517, 519, 605, 611) were usually taken to Roy's garage where the repairman would remove the serial number plates and cut up the wrecks (R. II, 410; R. III, 606). When the demolishing operation at the garage became too dangerous, Wapnick asked Gersh to permit the wrecks to remain on his lot after the serial number plates had been removed. Gersh agreed to this for the payment of an additional $50 above the cost of the wreck (R. II, 404–406, 409–413). After a serial number plate and MV 50 form had been obtained, the thieves would be told to bring in a car of the same model and make as the wreck (R. III, 497). The thieves would bring the stolen cars to Roy's garage at night (R. III, 737). They were paid with money supplied by Wapnick (R. II, 443, 470; R. III, 497, 513, 515, 520, 524, 535). In the garage, the serial number plates from the stolen cars were replaced with the plates taken from the wrecks. The stolen cars were cleaned and in some instances repainted (R. II, 413; R. III, 735).

After the stolen cars were altered, some sixteen or seventeen (eleven of which were involved in counts 6–16 (R. I, 6–10) were purchased by one Steinbrecher, owner of a Bronx, New York, wholesale auto sales company, to whom Wapnick was introduced by petitioner LaFazia (R. III, 770–774). Steinbrecher told Wapnick that any cars he purchased would have to be accompanied by proper papers showing the

passage of titles since such cars would be shipped out of the state. Wapnick stated that he would have the title papers made out in the name of Robert Ezersky. It was agreed that Steinbrecher's checks in payment for the cars would be made payable to Ezersky, but delivered to Wapnick (R. III, 770–773, 819–820).

In early July of 1959, Steinbrecher became suspicious when Ezersky refused to give him a MV 50 form for a 1959 Oldsmobile (which is involved in overt act 20, in the conspiracy count (R. I, 14)). He told Wapnick who came in for payment that he would hold the car, have the police auto squad check it, and pay him the following day (R. III, 774–775). Wapnick left, called Roy, told him of Steinbrecher's suspicions, and asked Roy to pick up the car. Roy refused to comply, telling Wapnick to send his friends, petitioners LaFazia and Brill, to pick up the car (R. III, 524–525). An hour or two later Brill picked up the Oldsmobile signing the receipt with an illegible and fictitious name (R. III, 775–782). Brill later told Roy that Steinbrecher had remarked that he thought there was something wrong with the car and that he (Brill) had told Steinbrecher to mind his own business (R. III, 528).

On July 4, 1959, Brill delivered this 1959 Oldsmobile to Di Napoli, a used car dealer in Waterbury, Connecticut, to whom Brill had been introduced by LaFazia. With the car Brill presented a form MV 50 bearing a fictitious name and Brill received a check made payable to this name (R. III, 693–695, 698–701, 707–708). This automobile was later identified by its

hidden serial number as one having been stolen on July 2, 1959 (R. II, 56, 59–60, 119–121). On July 8, Brill delivered to Waterbury two other cars which he had picked up from Roy's New York garage—a 1959 Oldsmobile and a 1957 Ford (R. III, 708–709) (which are involved in counts 1 and 2 (R. I, 4)). Although Brill at first wanted cash in payment, he accepted checks from Di Napoli after contacting Wapnick by telephone (R. III, 722–723). At Brill's request the checks were made payable to the names listed on the MV 50 forms—names which were in fact fictitious (R. III, 716–720). The two automobiles were identified as those stolen on July 7, 1959 (R. II, 27–28, 42–45, 123–126).

In the meantime, petitioner LaFazia had picked up from Roy's garage three cars stolen on March 16, April 24, and May 26, 1959 (R. II, 53–55, 51–52, 25–26), (which are involved in counts 3, 4, and 5 (R. I, 5)). In March and in May he delivered and sold the first two of these cars (a 1957 and a 1958 Chevrolet) to Di Napoli in Connecticut (R. III, 667, 675) and in June he delivered the third car (a 1959 Plymouth) to another Connecticut dealer (R. III, 659–661). LaFazia told the buyers to make two of the checks payable to New York firms with which he was associated. Two of the checks bore the endorsement of Wapnick's firm (R. III, 680–681, 672–675). A fourth car, a 1957 Chevrolet stolen on June 26 (overt act 28 of the conspiracy count (R. I, 15)) was picked up by LaFazia from the repairman, Monteiro, and delivered in June to Di Napoli in Connecticut (R. II,

61–63; R. III, 688). A check for this car, made payable to Ezersky, was endorsed by LaFazia and cashed for him by Di Napoli (R. III, 688–690). In May or early June, prior to the delivery of this car, LaFazia asked Monteiro whether the cars were "hot," adding if they were, "he [Wapnick] will have to straighten it out with money" (R. III, 616–619). Upon one occasion LaFazia took a stolen automobile to Steinbrecher together with papers upon which he had notarized the signature of a person purportedly transferring the car. There was no directory listing for any such person and no such residence address as that given for the notarized signature (R. III, 797–799, 802–804, 914–915).

ARGUMENT

1. The sufficiency of the evidence, upheld by the court below, presents no issue warranting review by this Court.

a. As to the substantive counts, it was necessary to show only that petitioners knew that the cars were stolen and that petitioners either themselves transported the cars in interstate commerce or aided and abetted the transportation. See *United States* v. *Tannuzzo*, 174 F. 2d 177, 180 (C.A. 2), certiorari denied, 338 U.S. 815; *United States* v. *Sherman*, 171 F. 2d 619, 623 (C.A. 2), certiorari denied *sub nom. Grimaldi* v. *United States*, 337 U.S. 931; *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2); *Loftus* v. *United States*, 46 F. 2d 841, 847 (C.A. 7). The evidence in this case

clearly established both these elements as to the substantive offenses of which petitioners were convicted.

The claim of petitioners other than Wapnick that the evidence does not show knowledge that the cars were stolen is refuted by the record. Petitioners Brill and LaFazia transported some of the stolen cars shortly after the theft across state lines. With the stolen cars the two delivered false documents of transfer (one notarized by LaFazia), showing the purported owners to be Ezersky or fictitious persons with non-existent addresses. They collected checks in payment made payable to Ezersky or the fictitious persons. Brill had a conversation with Roy, and LaFazia with Monteiro, which demonstrated that they knew that they were not acting innocently (see the Statement, *supra,* pp. 6, 8).

As to Gersh, the evidence showed that he was told by Roy and Wapnick of the plan to steal cars and to replace the serial identification plates of the stolen cars with those taken from the wrecks purchased from Gersh. Yet Gersh agreed to, and did, sell wrecks to Roy and Wapnick for this purpose, for prices higher in many instances than the wrecks were worth (R. III, 511, 519). Gersh agreed to, and did, issue the certificates of sale in the names of fictitious persons and in the name of Robert Ezersky. He also agreed for a price over and above the price of the wreck to dispose of wrecks from which serial plates were removed. It is obvious that Gersh knew that the cars were stolen and aided and abetted their transportation in interstate commerce.

b. As to the conspiracy count, the jury was instructed that, in order to find the defendants guilty, it must find that they knew the stolen cars were to be transported in interstate commerce (A. 72–74). It could reasonably conclude that there was an implied understanding among the conspirators that the stolen cars were to be sold to any outlet that might prove convenient or accessible, including an interstate outlet. This was sufficient. See *United States* v. *Crimmins*, 123 F. 2d 271, 273 (C.A. 2). There was in addition considerable evidence of direct knowledge of interstate transportation. Wapnick, the key figure in the enterprise, was told by Steinbrecher that the cars would be shipped out of state. He also sent Brill and LaFazia to pick up some of the stolen cars which they transported to Connecticut (R. III, 491, 537). On one occasion Brill called from Connecticut to get the permission of Wapnick in New York to take a check in payment for a car (R. III, 722–723). Some of the checks received by LaFazia from Connecticut dealers bore the endorsement of Wapnick's firm (R. III, 672–675). There was thus ample evidence that interstate transportation was within the contemplation of the conspiracy.[3]

2. The trial court's instructions were entirely proper. The court told the jury that, with regard to the substantive counts, the government was not required to prove actual knowledge of transportation—

[3] It should be noted that, as to all the petitioners except Wapnick, their conviction on *either* the substantive or conspiracy charge is sufficient to sustain the judgment since they received concurrent sentences.

that all that was necessary was proof that the defendants could reasonably foresee that the cars would be resold outside the state (R. I, 168–171: A. 34–37, 72–74). See *United States* v. *Tannuzzo*, 174 F. 2d 177 (C.A. 2), and the other cases cited *supra*, p. 8. Petitioners have cited no authority to the contrary. In *Barfield* v. *United States*, 229 F. 2d 936 (C.A. 5) (see Pet. in No. 1074, p. 7), the court held that driving wholly within a state in furtherance of an intended interstate journey would fall within the statute. That case is, if anything, authority for the correctness of the instruction which petitioners challenge.

The court's summary of the evidence in its instructions, contrary to petitioners' assertion (Pet. No. 1074, pp. 10–11), is an example of judicious impartiality. The court not only outlined the government's evidence—which was characterized as such (A. 43, 66, 68, 81, *et seq.*)—but in turn developed at length the facts forthcoming from the defense cross-examination of government witnesses and summarized the defense testimony (see A. 43, *et seq.*). The trial judge reminded the jurors repeatedly that they had the sole responsibility of determining the facts, that his recollection of the evidence could be disregarded, and that their recollection must control (A. 4, 9, 42, 66, 169, 170).

There was nothing improper about the action of the court in omitting, during the reading of the substantive counts of the indictment to the jury, the names of the defendants not on trial (see Pet. No. 1074, pp. 6–7). The court specifically told the jury

at the time that it was not reading the names of the defendants originally charged but no longer on trial (A. 10, 18). The jury could not have been misled into thinking that those on trial were the only participants. Indeed, the jury was made aware of the identity and number of the defendants originally charged since, in reading the conspiracy counts, the court included the names of all the defendants (A. 21–30, 43) and a chart taken to the jury room by stipulation of the parties contained the names of all the defendants (A. 223–224).

It is difficult to understand how the compliance of the court with the request from the jury for a re-reading of a portion of its charge defining conspiracy could be termed prejudicial error (see Pet. No. 1074, p. 11). The portion read properly defined a conspiracy (see A. 68–74). Moreover, no objection or exception was taken to the re-reading.

3. Petitioners make numerous contentions as to other errors committed at their trial. All these contentions are plainly without merit.

a. Petitioners object (Pet. No. 1074, p. 8) to the testimony of one of the car owners that his automobile, when stolen, contained vacation supplies in the trunk (R. II, 3–4), because this testimony could have caused the jury to convict petitioners on charges other than those for which petitioners were on trial. This suggestion that the jury would totally disregard the trial court's instructions as to the charges on which petitioners were being tried is, to say the least, far-fetched. This evidence was properly admitted for the purpose of identifying the car—which was later de-

scribed by Roy, a co-defendant, as having contained pots, pans, and canned goods when delivered to his shop (R. III, 516).

b. The contention that the trial court committed prejudicial error in receiving hearsay testimony (Pet. No. 1074, pp. 8–9) is likewise erroneous. Petitioners object to the testimony of Roy on cross-examination that as far as he knew $4,600 was given to Gersh on a five-car deal.[1] However, there is no definite indication that the testimony was hearsay—petitioners' contention is based solely on the inference that if Roy had direct knowledge of the payment he would have been more positive.[2] In any event, the total amount of money Gersh received for five cars is immaterial in view of the overwhelming evidence of his complicity.

Similarly, the court properly overruled objections to the testimony of Steinbrecher's bookkeeper that she had tried unsuccessfully by telephone to obtain from Gersh title papers to a car purchased from Wapnick (see Pet. No. 1074, pp. 9–10). The objection was made that this was hearsay in that she did not know Gersh. However, the bookkeeper testified that she called the office of Gersh, and asked for, and spoke three times to a man who identified himself as Gersh (R. III, 892–898). Moreover, documentary evidence showed that Gersh had issued a certificate of sale for this car to a person with a non-existent ad-

[1] This testimony is not part of the record in this Court.

[2] Earlier, Roy testified on cross-examination that he "believed" that the $4,600 was paid directly to Gersh or different dealers (R. III, 551).

dress (R. II, 245, 286; R. III, 890–892, 917). Thus, the testimony objected to was of little, if any, importance.

c. Petitioners' assertion (Pet. No. 1074, pp. 12–13) of numerous irregularities, which were not argued in the court of appeals and are now made without elaboration or record documentation, deserves little comment. The claims, even if they had been properly raised, are obviously frivolous. Government witnesses are of course permitted to confer with the prosecutor. Rule 43 of the Federal Rules of Criminal Procedure specifically provides for continuing a trial when a defendant has voluntarily absented himself. The claim that some of the jurors were postoffice employees who knew one of the witnesses as their superior is totally unsupported by specific facts. The claim that there was no reporter present when "certain testimony" was re-read to the jury is not only unsupported, but the transcript shows that when the jury returned for further information upon two occasions it was the reporter who re-read the testimony (A. 231–244, 247–251). As to the assertion that Brill was denied the right to change lawyers, there is no such absolute right after the trial has begun. See *United States ex rel. Hyde* v. *McMann*, 263 F. 2d 940 (C.A. 2), certiorari denied, 360 U.S. 937; *United States* v. *Mitchell*, 137 F. 2d 1006, 1011 (C.A. 2).

4. Petitioner Wapnick claims (Pet. No. 1044, pp. 5–6) that, by virtue of his acquittal of crimes in the New York Bronx County Court, the prohibition against double jeopardy and the principles of *res judicata* and collateral estoppel barred the federal

prosecution against him. As the district court held (*United States* v. *Wapnick*, 198 F. Supp. 359 E.D. N.Y.), even if the federal prosecutions were predicated upon the same acts as the state prosecution, double jeopardy, *res judicata*, or collateral estoppel could not bar the federal prosecution, since the actions were brought by two different sovereigns for crimes punishable by each. *Abbate* v. *United States*, 359 U.S. 187; *United States* v. *Lanza*, 260 U.S. 377; *Serio* v. *United States*, 203 F. 2d 576, 578 (C.A. 5), certiorari denied, 346 U.S. 887; *Cosgrove* v. *United States*, 224 F. 2d 146, 150 (C.A. 9).

In actuality, however, the offenses were quite different. The state indictment consisted of six counts charging petitioner Wapnick and Robert Ezersky with grand larceny of money fraudulently obtained by means of false representations as to the ownership of cars (counts 1 and 2), with removing or defacing identification numbers of motor vehicles (counts 3 and 5), and with criminally receiving motor vehicles (counts 4 and 6).* The criminal charges involved only two automobiles, a 1957 Cadillac (counts 1, 3, and 4) and a 1958 Chevrolet Impala (counts 2, 5 and

* We are lodging with the Clerk of this Court a copy of the indictment in the Bronx County Court. As will be noted, the indictment did not charge a conspiracy. Therefore, while the evidence at the state trial included some details of the "hot car deal," the judgment of the state court could not have acquitted Wapnick of conspiracy. The averment of the concluding paragraph of the state indictment that the acts and transactions "constitute parts of a common scheme and plan" is a form of pleading in New York used for the purpose of consolidating indictments and does not charge a crime. See New York Code of Crim. Procedure, Sec. 279.

6), neither of which was involved in the federal indictment. Count 1 of the state indictment did mention that Wapnick had falsely represented that he had title to a 1958 Ford but it did not charge (as it did with respect to the car on which the count was based) that he did not in fact have legal title to the car. This car which is not the foundation of the state charge is the only one involved in the federal indictment (count 14). The federal indictment was directed against a large ring of car thieves engaged in interstate commerce—charging sixteen defendants in seventeen counts involving sixteen cars, fifteen of which were not mentioned in any way in the state charges. In these circumstances the present prosecution did not in fact duplicate the state prosecution and therefore did not violate the federal policy against duplicating state prosecutions. See *Petite* v. *United States*, 361 U.S. 529.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

JUNE 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1074

DAVID BRILL,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

To the Honorable Justices of the Supreme Court of the United States:

The petition of David Brill, one of the defendant-appellants in the case of *United States of America against James LaFazia, et al.*, respectfully prays for a rehearing by the Court in banc of this Court's decision of June 17, 1963 denying the petition for certiorari.

Statutes Involved

Petitioner was convicted of transporting stolen motor vehicles in interstate commerce and of conspiracy in violation of 18 U. S. C. 2312, 371, 2.

Petitioner respectfully requests this Court for a rehearing upon the following grounds:

1. That he is innocent having had no connection with or participation in the offenses charged.

2. That the facts necessary to sustain a conviction as to him are absent.

3. That he is an innocent victim of the machinations of the arch-conspirator, to wit: Harold Wapnick, who was tried simultaneously with petitioner and that while the evidence as to Wapnick was overwhelming, it nevertheless reacted unfavorably to petitioner who was indeed unfortunate as to be tried at the same time as said Wapnick.

4. A reading of the testimony which had been filed by the said Wapnick and certified discloses the inconsequental participation by petitioner; the honesty and good faith of petitioner in making two deliveries of automobiles merely as an errand boy and without the slightest knowledge that the cars had either been stolen or serial numbers changed; particularly so when the Trial Court erred in insfructing that the government did not have to prove petitioner's knowledge that stolen cars were being transported in interstate commerce. (Pages of record—A-36, A-189.) The Court has held that in a conspiracy case knowledge of the interestate character of the transaction is deemed requisite. *United States* v. *Crimmins* (C. C. A. 2, 1941.) The same rule must be held applicable to the substantive offense.

5. Petitioner's rights were violated by numerous irregularities. The minutes will disclose in the midst of the trial, petitioner's brother died. Petitioner had to absent himself from the courtroom for three days. Request was made to the court to halt the proceedings.

Request was denied and the trial proceeded in petitioner's absence and damaging testimony was introduced in the interim as to petitioner. More important, petitioner's request for a change of lawyers after he returned to the courtroom was denied although made in good faith for the reason that counsel representing him could not properly do so by reason of a conflict of interests. His attorney was representing a co-defendant, James LaFazia. It is clearly evident therefore that petitioner's constitutional rights were placed in jeopardy by the Court's refusal to permit him to change attorneys and its failure to permit him to have an attorney of his own choosing.

6. Numerous other irregularities occurred, to wit: request to declare a search of his home without a search warrant illegal. A slip of paper found in his home was offered in evidence over objection due to illegal search and seizure.

7. Finally, the record will disclose that the proof against petitioner was inconsistent with guilt and consistent with innocence. That the proof against him was not of a clear or conclusive character. That he did not receive a fair and impartial trial.

8. The cumulative effect of the errors, particularly the refusal of the Trial Court to permit him to have counsel of his own choosing, necessitates a reversal of petitioner's conviction. *Gordon* v. *United States*, 344 U. S. 414. Particularly true whereas in the instant case as to petitioner only, this was a "close one" and not "open and shut". The errors described herein are not harmless and were indeed prejudicial. *Bihn* v. *United States*, 328 U. S. 633; *United States* v. *Tomaiolo*, 249 F. 2d 683.

Petitioner, appearing *pro se* respectfully submits therefore that in the interests of justice there should be a re-hearing together with stay of execution.

Respectfully submitted,

DAVID BRILL,
Petitioner, pro se.

I, DAVID BRILL, petitioner appearing *pro se* hereby certify that this petition is not submitted for purposes of delay.

DAVID BRILL

JUL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1074

CHARLES GERSH,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Charles Gersh, one of the defendant appellants in the case of *United States of America* v. *James LaFazia, et al.*, respectfully prays for a re-hearing by the Court of this Court's decision of June 17, 1963 denying the petitioner's application for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner was convicted of transporting stolen motor vehicles in interstate commerce and of conspiracy in violation of 18 U. S. C. 2312, 371, 2.

Petitioner was sentenced to serve three and one-half years. He was continued on bail during the pendency of appellate proceedings.

Petitioner respectfully requests a reconsideration by this Court of its decision denying his application upon the following grounds:

First: That he is an innocent victim having had no connection with the offenses charged.

Second: That the Trial Court improperly permitted hearsay testimony as to payment of money for wrecked automobiles (October 25, page 481). The testimony showed that petitioner Gersh was in the business of selling auto wrecks. The introduction of hearsay testimony as to payment to petitioner of moneys, to wit: $4,600 for automobiles undoubtedly influenced the determination of his complicity. Proof of such remote kind is not to be received as an element of the requirement that guilt be shown beyond a reasonable doubt. Judicial disapproval of hearsay is of such commonplace occurrence as scarcely to require the citation of authority. *Hopt v. Utah*, (1884) 110 U. S. 574.

Third: An important prosecution witness who admitted he did not know petitioner was allowed, over objection (Nov. 15, pp. 2-4, 120) to testify as to a number of telephone conversations with him damaging indeed and suggesting conscious-ness of guilt. This testimony was permitted to be received by the jury notwithstanding the fact that there was an absence of proof of the identity of the speaker. The testimony was wholly incompetent since "the witness must recognize the declarant's voice." L. Hand, Circ. J., in *United States v. Frankel* (C. C. A. 2, 1933). Identification, however slight, is necessary. In the absence of identification, testimony was wholly prejudicial. *Lewis v. United States* (C. C. A. 6, 1926), 11 F. 2d 745.

Fourth: Petitioner respectfully states that the effect of the errors herein described warrants a reconsideration

especially where the case as shown by the record is "a close one". *Bibo* v. *United States*, 328 U. S. 633; *United States* v. *Tomaiolo*, 249 F. 2d 683.

FIFTH: The government's case was based upon inferences and not upon direct evidence tending to connect petitioner with the conspiracy. Petitioner was swept within the dragnet of conspiracy with the result that it brought about a hostile atmosphere culminating in his conviction. *United States* v. *Falcone* (C. C. A. 2, 1940), 109 F. 2d 578 (311 U. S. 205). In the latter case Mr. Justice Stone pointed out that knowledge of the conspiracy could not be inferred "from the casual and explained meetings of respondents with others who were convicted as conspirators."

CONCLUSION

The Petition for a Re-rearing Should Be Granted.

Respectfully submitted,

JOSEPH BIALL,
Attorney for Petitioner Charles Gersh.

CERTIFICATE

I, JOSEPH BIALL, do hereby certify that this petition for rehearing is made in good faith and not for the purpose of delay, and in my judgment, upon sufficient grounds.

JOSEPH BIALL.

Dated: New York, New York,
July 5th, 1962.